No. 96360-6

**SUPREME COURT OF THE STATE OF WASHINGTON**

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KING COUNTY,
Appellant,
v.

KING COUNTY WATER DISTRICTS
Nos. 20, 45, 49, 90, 111, 119, 125, et al.

Respondents,

AMES LAKE WATER ASSOCIATION, DOCKTON WATER ASSOCIATION, FOOTHILLS WATER ASSOCIATION, SALLAL WATER ASSOCIATION, TANNER ELECTRIC COOPERATIVE, and UNION HILL WATER ASSOCIATION,

Intervenor-Defendants.

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# BRIEF OF AMICUS CURIAE SHAWNEE WATER ASSOCIATION

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

*Amicus curiae* Shawnee Water Association, a Washington non-profit corporation ("**SWA**") operates a water utility on Vashon Island in unincorporated King County. SWA's main distribution pipeline runs across and along the unpaved shoulder of Vashon Highway SW, a county road. The sole purpose of SWA and its water system is to provide water service to 14 residential properties abutting Vashon Highway that are owned by SWA's members.

The members of SWA are successors in title to the previous owners of that portion of Vashon Highway which is occupied by SWA's water system. In the early 1930's the previous owners conveyed by deed a strip of land across the middle of their irrigated farmland to the State of Washington for a new state highway.[1] At the time of conveyance the water system, now operated by SWA, had been in existence and in open, apparent and continuous use for many years, and since then has been in continuous use.

In extensive correspondence with King County concerning Ordinance 18403 (the "**Ordinance**") SWA's attorney, the undersigned, claimed that the County had no authority to impose on SWA "reasonable compensation," described in the Ordinance as "in the nature of rent" "in return for the valuable property right to use the right-of-way." Ord.

[1] Subsequently, the State administratively transferred the highway ROW to King County.
[2] SWA concurs with and adopts by reference Respondents' Statements of the Case and arguments relating to the County lack of authority to collect rental compensation from utilities, but to avoid repetition SWA restricts itself in this brief to issues of particular

18403, §8. SWA contended, *inter alia*, that as successors in title to the grantors, it and/or its members, had an easement right to use the road right-of-way for its water line, both by express deed reservation and by implied reservation based on apparent prior use that was known to the State at the time of conveyance.

After SWA presented documentary evidence of its easement interest, the County did not dispute SWA's claim, and despite being aware of the claim the County chose not to name SWA as a defendant when it initiated this litigation.

## II. INTRODUCTION

The County did not, until its Reply Brief, address whether it claimed the Ordinance required utilities holding easement rights to use county ROW's to pay rental compensation. If the Ordinance did indeed confer on the County the "overarching authority" it now claims to force easement holders to either pay rental compensation or be ejected from their occupancy, the County would then be empowered to extinguish these utilities' easements, reducing their property interests to mere revocable licenses. The County asserted this "overarching authority" over easement holders' property interests only in a footnote in its Reply Brief, and without citation to authority.

The Ordinance, if reinstated and enforced, would diminish or extinguish the property rights of utilities whose occupancy and use of

County ROW derives from easements that they or their predecessors have acquired, and would violated several constitution provisions.[2]

## III. ARGUMENT

### A. The rights of easement-holding utilities using County ROW are irrevocable property rights, not "privileges" subject to revocation by the County.

The County asserts the power to collect compensation "in the nature of rent" for utilities' use of county ROW, even when their right of use derives from an easement. Ordinance, § 8.A; Reply Br. at p. 42, n.32. The County further asserts the power to eject utilities that refuse to pay rental compensation. Ordinance, § 10.A; Reply Br. at p. 4. The County's asserted powers are fundamentally inconsistent with the very nature of the easement rights of easement-holding utilities. In essence, the County assumes that the rights of utilities holding easements are no greater than those of a licensee.

The rights of a utility occupying a county ROW pursuant to an easement are not so constrained. "An easement is a right, distinct from ownership, to use in some way the land of another, without compensation." City of Olympia v. Palzer, 107 Wn.2d 225, 229, 728 P.2d 135 (1986) (citation and internal quotation marks omitted). Moreover,

[2] SWA concurs with and adopts by reference Respondents' Statements of the Case and arguments relating to the County lack of authority to collect rental compensation from utilities, but to avoid repetition SWA restricts itself in this brief to issues of particular concern to easement-holding utilities. By omitting this material from its brief, SWA does not intend thereby to waive the right to assert any omitted arguments in any future proceeding pertaining to the County's authority to obtain rental compensation.

"[t]he most significant distinction [between an easement and a license in land] is that an easement constitutes a nonposessory interest in land and is not subject to revocation at will," as opposed to licenses, which can usually be revoked at any time. Bruce & Ely, The Law of Easements and Licenses in Land, §11:1 at p.784; § 1:4 at p. 10 (2019 ed.).

It is the nature of an easement holder's rights vis-à-vis those of the servient estate owner[3] that "the [servient estate] owner may not legally do something, such as blocking the use of an easement, that is inconsistent with its proper use." 17 Stoebuck & Weaver, Washington Practice, Real Estate, § 2.9 at n. 25 (2nd ed.) (citing Mahon v. Haas, 2 Wn.App. 560, 468 P.2d 713 (1970)). See also City of Seattle v. Nazarenus, 60 Wn.2d 657, 666, 374 P.2d 1014 (1962) (holding that the servient estate owners had "only such use of the right of way as does not materially interfere with the [easement holder's] use thereof.")

The County cites no authority for its claimed right to interfere with the easement rights of utilities by revoking their easements for refusing to pay additional compensation specifically in exchange for the right to continue their use of the ROW.[4] But the County's entire premise is that it

[3] Whether the County has a fee interest as opposed to an easement interest in its ROW's, is an issue raised in this case, but is not pertinent to the issues discussed in this brief, for even if the County's interest is an characterized as an easement, "[w]hen two or more persons hold * * * different types of easements in a servient estate, neither may unreasonably interfere with the other party's rights." Bruce & Ely, § 8:36 at p.615.

[4] SWA does not address herein whether the County is authorized to seek reimbursement for its reasonable costs associated with issuing and administering franchises of easement-holding utilities, as provided in Ordinance § 6.

"holds controlling property rights" in all its ROW, "regardless of the specific real property interest held in the ROW." Opening Br. at p. 10; Reply Br. at p. 11.

That premise is false. Easements "are property rights or interests. * * * They are rights that were contained within the right of possession and carved out of it by the owner of the possessory estate: sticks taken out of the bundle." Stoebuck & Weaver § 2.1 at n.1. Except for any easements the County may have itself granted to utilities, *utilities' easements are property interests that the County never acquired in the first place*. The rights of easement-holding utilities to use county ROW in accordance with the terms of their easements cannot then be considered a "public asset" (Opening Br., p. 10) at all; those easement rights are the utilities' own property that they or their predecessors never conveyed to the County.

Likewise, utilities' use of county ROW pursuant to easements are not "privileges," as the County contends, but rather rights. "'Privilege,' correctly used, refers to a license, revocable at the will of the landowner and not truly and interest in land. Easements are true rights in land, irrevocable for the time for which created." Stoebuck & Weaver, § 2.1, n.1.

Simply put, the County never granted these utilities any "privilege" at all that it could later revoke. Instead, these utilities or their predecessors

*retained* their prior right to use county ROW when other "sticks" of rights to the ROW were conveyed to the County.[5]

This Court affirmed as much in North Spokane Irrig. Dist. No. 8 v. Spokane Cty., 86 Wn.2d 599, 606, 547 P.2d 859 (1979), when it held that a dedicator's reservation to itself of the right to install and operate water pipes in the dedicated streets created in the dedicator "a property interest, in the form of an easement * * *." The Court's holding would of course apply with at least equal force to reservations contained in deeds instead of dedications.

As with Spokane County in North Spokane Irrig. Dist,, id. at 604, the County in this case also failed to present any evidence that the utilities' mere use of county ROW, in and of itself, hinders or interferes with the County's statutory rights to the use and control of the streets in the ROW. Thus the County cannot contend that the occupancy of county ROW alone is such an interference with County's use or control of its streets as to justify additional compensation for the occupancy or revocation of the utilities' easement rights.

**B. Rental compensation charged to easement-holding utilities constitutes an unconstitutional non-uniform tax.**

Because the easement rights of utilities to use County ROW are not a "public asset," but rather their own property, the County's argument

[5] Thus the County could not be said to have "granted" any "privilege" to these utilities in violation of Const. Art. I §8.

that its rental compensation charge is not a tax fails. The County's argument rests on the premise that the charge is rent for use of County property. Reply Br. at pp. 46-47. In the absence of that premise, the County's compensation charge is clearly a tax, whether this Court applies the Covell factors, or the factors articulated in City of Snoqualmie v. King Cty. Exec. Dow Constantine, 187 Wn.2d 289, 386 P.3d 279 (2016).

Most telling is the County's attempt in its Reply Brief at pp. 49-53 to avoid characterization as a tax based on the City of Snoqualmie factors. As to every factor, the County relies almost exclusively on the premise that the compensation charge is related to the utilities' use of property that belongs to the County:

> -- the charge "corresponds to the value of the County's property used by the Utilities." Reply Br. at 51;
>
> -- the compensation collected from the utilities "is intended to reimburse the County for use of its ROW property." Reply Br. at 52
>
> -- "payment is made in exchange for the valuable property right received" to use County property. Reply Br. at 53.

If the County's rental compensation constitutes a tax when assessed against utilities having easement rights to use of ROW, then that tax is properly categorized as a property tax, which this Court has defined as "an absolute and unavoidable demand against property or the ownership of property." Covell v. City of Seattle, 127 Wn.2d 874, 890, 905 P.2d

324 (1995). The County is attempting to charge easement-holding utilities rental compensation not for use of property the County owns, and not for any service the County is providing to those utilities, but only because the utilities own easement rights. As in Covell, "[l]iability for the charge arises from the Appellant's status as property owners and not from their use of a city service." Id.

The County's charge would be stacked on top of the real estate taxes these utilities or their owners already pay for the value of their easement rights,[6] with the result that the utilities' easement rights would be taxed at a higher rate than similar easement rights owned by others that do not happen to be located within County ROW.

The County's rental compensation charge would therefore violate Const. Art. VII § 1, which requires that "[a]ll taxes shall be uniform upon the same class of property * * *. All real estate shall constitute one class." See, e.g., Covell, 127 Wn.2d at 878, 891 (city charges determined to be a property tax and held to be unconstitutional "since they are not imposed in a uniform manner based on the value of property").

**C. Ejectment of easement-holding water or sewer utilities from County ROW would be an exercise of the power of eminent domain, a power the County lacks.**

[6] RCW 84.04.090 defines real property for taxation purposes as including land and "all rights and privileges thereto belonging or in any wise appertaining * * *." See also Carpenter v. Franklin County Assessor, 30 Wn.App. 826, 828-29, 638 P.2d 619 (1981) (real property under RCW 84.04.090 includes an easement for irrigation ditches).

North Spokane Irrig. Dist. also held that a utility's easement interest to occupancy and use of county ROW is a compensable property interest under Const. Art. I § 16. 86 Wn.2d at 606. Any action by the County to eject easement-holding utilities from County ROW would therefore be an attempt to exercise the power of eminent domain.

Any attempt by the County to eject utilities from their easements on County ROW, as authorized by Ordinance § 10.A, would entirely eliminate the utilities' easement rights and be a taking. "Any taking and/or damaging of an easement by a public body requires the payment of just compensation." North Spokane Irrig. Dist., 86 Wn.2d at 606.

But, at least as to water and sewer utilities holding easement rights, the County has no eminent domain power. "[C]ounties shall not have power to condemn sewerage and/or water systems of any * * * private utility." RCW 36.94.020. Nor may counties condemn "any part of any or all of" a water or sewer system. RCW 36.94.010(2)(c).

**D. By raising revenue from easement-holding utilities for general government purposes unrelated to their use of County-owned property, the County would be imposing on them a burden which should be shared commonly, and would violate their substantive due process rights.**

Even if the County does not go so far as to attempt to eject utilities, the County's imposition of a rental compensation scheme on easement-

holding utilities would nevertheless be an unreasonable regulation that violates the substantive due process rights of easement-holding utilities, applying this Court's analysis in Presbytery of Seattle v. King Cty., 114 Wn.2d 320, 330-33, 787 P.2d 907, cert. denied, 498 U.S. 911 (1990). Usually the determinative inquiry in the Presbytery analysis is whether the government regulation is "unduly oppressive," id. at 331, and that is the determinative issue with the County's rental compensation charge. The County's admitted purpose in imposing a compensation charge is to raise revenue for the general fund to help provide a broad range of services to the general public. Inasmuch as the County through Ordinance § 6 already collects reimbursements from utilities for all of its costs related to administering franchises, the additional money collected through rental compensation would be wholly unrelated to any problems the utilities may be causing by occupying County ROW. The County's shortage of general fund revenue is therefore a problem common to all citizens and should "be shouldered commonly and not imposed on individual property owners." Robinson v. City of Seattle, 119 Wn.2d 34, 55, 830 P.2d 318 (1992).

**III. CONCLUSION**

Reinstating the Ordinance, as the County requests, would open a Pandora's box of constitutional issues. This Court's policy is to avoid constitutional questions where a case can fairly be resolved on other grounds. Community Telecable of Seattle, Inc. v. City of Seattle Dept. of Exec. Admin., 164 Wn.2d 35, 41, 186 P.3d 1032 (2008). This Court can

fairly resolve this case by adopting the Respondents' position and affirming the trial court's summary judgment.

DATED this 9th day of August, 2019.

Respectfully submitted,

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**PROOF OF SERVICE**

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of August, 2019

*/s Neil H. Robblee*
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**August 09, 2019 - 6:21 PM**

**Transmittal Information**

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